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MICHAEL RODAK, JR., CLE

No. 76-255

In the Supreme Court of the United States

OCTOBER TERM, 1976

HAZELWOOD SCHOOL DISTRICT, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1b-32b) is reported at 534 F. 2d 805. The opinion of the district court (Pet. App. 1a-26a) is reported at 392 F. Supp. 1276.

JURISDICTION

The judgment of the court of appeals (Pet. App. 1c) was entered on April 20, 1976, and a timely petition for rehearing was denied on May 25, 1976 (Pet. App. 1d). The petition for a writ of certiorari was filed on August 20, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether Title VII of the Civil Rights Act of 1964 is unconstitutional as applied to state and local governments.

2. Whether the court of appeals properly ruled that the statistical evidence presented, along with other evidence of discrimination, established a *prima facie* case of employment discrimination.

STATEMENT

The United States brought this suit on August 9, 1973, under Title VII of the Civil Rights Act of 1964, 78 Stat. 253 *et seq.*, as amended, 42 U.S.C. 2000e *et seq.*, and the Fourteenth Amendment to the Constitution, alleging racial discrimination in the employment practices of petitioners Hazelwood School District, the Superintendent of Schools, and members of the Hazelwood Board of Education. The complaint alleged that the School District, which borders on the St. Louis City School District, had engaged in a pattern or practice of racial discrimination in employment by its failure to hire black applicants who were as well or better qualified than the whites who were hired, by its recruiting practices and selection procedures, and by its perpetuation of the effects of past discrimination. The complaint sought an injunction to require the District to cease discriminatory practices, to take affirmative action to recruit black faculty and personnel, and to make offers of employment and back pay to black persons who were discriminatorily rejected (Pet. App. 1b-2b).

At trial, the United States presented evidence to show that the Hazelwood School District had a practice of discriminating in its hiring practices that originated prior to 1954, when Missouri public schools were segregated by law, and that the practice had not been discontinued. The United States also presented statistical evidence which showed that, while more than 15 percent of all teachers in St. Louis City and County are black, only two percent of the teachers employed by the Hazelwood School District are black (Pet. App. 18a). Evidence

was also introduced to prove that the School District's hiring procedures were standardless and that 55 rejected black applicants had apparently been discriminated against on account of their race (Pet. App. 5a-16a).

The district court held that the United States failed to prove that petitioners had engaged in racially discriminatory hiring practices (Pet. App. 23a, 25a). In support of this holding, the court found that no individual black applicant had been rejected on account of race and that the United States had failed to establish a *prima facie* case of discrimination on the basis of the statistical evidence presented. Although the evidence showed that no blacks were employed by the School District until 1969 and that less than two percent of the Hazelwood faculty was black at the time of trial while more than 15 percent of all elementary and secondary teachers in St. Louis City and County are black, the court ruled that the United States had not demonstrated a statistical disparity sufficient to constitute a *prima facie* showing of employment discrimination, because less than two percent of the children in the Hazelwood District schools are black (Pet. App. 18a-19a). The court denied all relief (Pet. App. 25a-26a).

The court of appeals reversed. It found that the evidence adduced at trial demonstrated (Pet. App. 8b; footnotes omitted):

> * * * (1) a history of discriminatory practices in the hiring of teachers by Hazelwood prior to the effective date of Title VII, (2) a statistical disparity between the proportion of blacks in Hazelwood's workforce and the proportion of blacks in the labor market, (3) an unstructured decentralized hiring process in which subjective criteria predominate in evaluating candidates, and (4) specific discrimination against 16 black applicants for teaching positions at Hazelwood.

This evidence, the court determined, was sufficient to establish a *prima facie* case of racial discrimination —a showing that petitioners did not rebut.

With regard to the district court's analysis of the statistical evidence presented, the court of appeals stated that "[t]he level of black student enrollment in Hazelwood school[s] sheds no light whatsoever upon the dispute before us" (Pet. App. 11b). It therefore concluded that the district court erred in "absolving Hazelwood of unlawful employment practices on the basis of the paucity of black students in the Hazelwood schools" (*ibid.*).

The court of appeals also found clearly erroneous the district court's findings that 16 of the rejected black applicants were not rejected on account of their race (Pet. App. 15b-25b). In each instance, the court of appeals ruled that the United States had made out a *prima facie* case of employment discrimination that had not been rebutted by petitioners.

The court of appeals directed the district court permanently to enjoin petitioners from engaging in discriminatory hiring practices, require the School District to promulgate and publish job descriptions and hiring criteria, grant other specific injunctive relief, and require petitioners to place the names of the 16 discriminatorily rejected black applicants on a preferred hiring list and to give them the right to refuse first any vacancies to which their qualifications would entitle them (Pet. App. 26b-27b).

ARGUMENT

Petitioners contend there are two reasons warranting review by this Court. First, they argue (Pet. 7-13) that insofar as Title VII reaches racially discriminatory employment practices by a state or local government

that are "other than purposeful" (*id.* at 13), the statute exceeds congressional power under Section 5 of the Fourteenth Amendment. Second, they suggest (*id.* at 14-21) that the court of appeals erred in its consideration and analysis of the statistical data. Whatever the merits of these questions in the abstract, they are not presented by this case. The court of appeals concluded, as described below in greater detail, that the petitioner School District had engaged, *inter alia*, in purposeful, racially discriminatory recruitment practices, and found 16 instances (Pet. App. 15b-25b) in which the record established an unrebutted *prima facie* case of racial discrimination against black applicants for teaching positions. The court of appeals correctly applied well-established legal principles, and further review is not warranted.

1. Petitioners contend that the court of appeals found a violation of Title VII solely upon the basis of a statistical disparity between the percentage of blacks in the relevant labor market and the percentage of blacks employed by the District and that Title VII is therefore unconstitutional as applied. Relying on this Court's decision in *Washington* v. *Davis*, No. 74-1492, decided June 7, 1976, petitioners argue that, to the extent that Title VII allows a finding of discrimination in the absence of a showing of discriminatory purpose, the statute as applied to state and local governments is beyond the power granted to Congress under Section 5 of the Fourteenth Amendment.

The issue is not presented by this case. The decision of the court of appeals was not based solely upon evidence of a statistical disparity between the percentage of black teachers in the Hazelwood School District and the percentage of blacks in the relevant labor market. The court of appeals found that (Pet. App. 9b; footnote omitted):

> * * * prior to 1954, Hazelwood employed no black teachers in its all-white schools in accordance

> with the custom in the county; that from the time that Hazelwood's schools were integrated [until] 1969, it employed no black teachers; that Hazelwood placed newspaper advertisements for "white only" teachers in 1962; and that Hazelwood officials have never recruited from any predominantly black college, although they did recruit from predominantly white universities in Missouri and elsewhere.[1]

The court also found (Pet. App. 15b-25b) that petitioners had discriminated on account of race against 16 specified rejected black applicants. In so ruling, the court of appeals rejected, as clearly erroneous, the contrary findings of the district court. In addition, the court of appeals emphasized (Pet. App. 8b, n. 5) that it approached with caution the statistical evidence presented. The court concluded that the statistical evidence, "when considered in light of Hazelwood's hiring procedures involving the use of vague and subjective criteria," and buttressed by the evidence of past discriminatory practices and present discriminatory rejection of qualified black applicants, established a *prima facie* violation of Title VII (Pet. App. 14b-15b).

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[1]Petitioners argue that evidence of Hazelwood's discriminatory hiring practices before 1972 when state and local governments were first covered by Title VII is irrelevant to a determination that Hazelwood has violated Title VII (Pet. 20). Evidence of such discrimination is relevant, not only, as the court of appeals noted (Pet. App. 9b), because it may show that present policies or practices, although neutral on their face, perpetuate the effects of past discrimination, *United States* v. *Sheet Metal Workers, Local 36*, 416 F. 2d 123 (C.A. 8), but also because it may shed light on present deeds or policies that may violate Title VII. *Buckner* v. *Goodyear Tire and Rubber Company*, 339 F. Supp. 1108 (N.D. Ala.), affirmed, 476 F. 2d 1287 (C.A. 5); *Evans* v. *Local Union 2127, International Brotherhood of Electrical Workers, AFL-CIO*, 313 F. Supp. 1354 (N.D. Ga.).

Thus, contrary to petitioners' assertion (*e.g.*, Pet. 9-10), it is apparent from these findings that the court of appeals did not rest its decision upon statistical evidence alone. There is consequently no reason for the Court to consider in this case whether Title VII might be unconstitutional as applied in different circumstances.

2. Petitioners' contentions with regard to the use by the court of appeals of statistical evidence does not warrant review. Petitioners claim that the court of appeals' statistical analysis, which compared the percentage of black teachers in the Hazelwood School District (less than two percent in 1973-1974) to the percentage of black teachers in the area from which most of Hazelwood's teachers came when they were hired (more than 15 percent black in 1970) (Pet. App. 10b), is "plainly defective" (Pet. 16). As we noted above, the court of appeals specifically recognized (Pet. App. 8b, n. 5) that

> * * * caution is necessary when using statistical evidence to analyze such disparities in employment figures for professional and academic positions. The raw data often will obscure the actual number of persons in the general workforce, white and black, who possess the special qualifications needed for particular openings. Here the problem has been minimized by the use of data from surrounding school districts (where the average number of black teachers is as high as 15%), the size of the disparity (2% as compared to 15%), and the presence of other indicia of discrimination.

We believe that the court of appeals properly weighed the statistical evidence and, in light of the substantial disparity found, properly concluded that the statistical evidence, together with other evidence of discrimination, established a *prima facie* case that petitioners failed to rebut.

In any event, petitioners do not challenge the findings of the court of appeals that 16 of 55 identified rejected black applicants were discriminated against on account of race by the Hazelwood School District (Pet. App. 15b-25b). These findings alone, without the supporting statistical data, would be sufficient to support a conclusion that the Hazelwood School District had engaged in a pattern or practice of discrimination in hiring on account of race.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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